

SERVED: April 15, 1994

NTSB Order No. EA-4150

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of April, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-13509 and
v.)	SE-13510
)	
ECHO, INC. and)	
JOHN G. RAFTER,)	
Respondents.)	
)	

OPINION AND ORDER

The respondents have appealed from the oral initial decisions Administrative Law Judge William E. Fowler, Jr., rendered in these consolidated cases on March 10, 1994, at the conclusion of a two-day evidentiary hearing.¹ By those decisions, the law judge affirmed, in substantial part, orders of the Administrator revoking, on an emergency basis, respondent

¹Excerpts from the hearing transcript containing the initial decisions are attached.

Echo's air carrier certificate and respondent Rafter's commercial pilot certificate for their alleged violations of numerous Federal Aviation Regulations ("FAR") while operating an air ambulance helicopter. For the reasons that follow, we have decided to grant respondent Rafter's appeal in part and to deny respondent Echo's.²

The emergency orders of revocation, dated January 28, 1994, set forth, in relevant part, the following allegations:

As to both respondents--

2. On November 19, 1993, [Echo authorized John G. Rafter to act as pilot-in-command and John G. Rafter acted as pilot-in-command] of civil aircraft N911ME, a Bell 206L1 single engine helicopter on passenger carrying flights from Portland, Maine, to Ellsworth, Maine, and from Ellsworth, Maine, with an intended destination of Portland, Maine.

3. Said flights were conducted under FAR Part 135 as air ambulance flights by Echo, Inc.

4. There was no second in command crewmember aboard N911ME during said flights on November 19, 1993.

5. Incident to said flight from Ellsworth, Maine, you operated N911ME into instrument flight rules (IFR) conditions.

6. Said operation is contrary to Echo Inc.'s operations specifications which authorize operations in a Bell 206L1 helicopter under visual flight rules (VFR) conditions only.

7. Said operation is contrary to the operating limitations of a Bell 206L1 helicopter which limit operations to those in VFR conditions only.

8. Said flights from Portland, Maine, to Ellsworth, Maine, and from Ellsworth, Maine, with an intended

²The Administrator has filed a reply brief opposing the appeals.

destination of Portland, Maine, were operated under weather conditions which did not conform to the minimum acceptable weather for VFR EMS [Emergency Medical Service] missions according to the Echo, Inc. Operations Manual and Specifications.

9. While enroute from Ellsworth, Maine, [respondent Rafter] requested and obtained an IFR clearance from Air Traffic Control [ATC].

10. At the time of said flights on November 19, 1993, [respondent Rafter had not, and respondent Echo used a pilot who had not], within the preceding six months, logged at least six hours of instrument flight time, at least three hours of which were in a helicopter, including at least six instrument approaches, or passed an instrument competency check in a helicopter.

* * *

14.[Rafter], 11.[Echo] While enroute from Ellsworth, Maine, the engine of N911ME quit due to fuel exhaustion and [Mr. Rafter was] forced to attempt an emergency landing on water.

15.[Rafter], 12.[Echo] As a result, N911ME overturned and sank, resulting in injuries to [Mr. Rafter] and the death of the three passengers onboard.

16.[Rafter], 13.[Echo] At the time [Mr. Rafter/Echo] began [the] flight from Ellsworth, Maine, N911ME contained insufficient fuel to conduct operations in VFR conditions to Portland, Maine, and thereafter for 20 minutes.

17.[Rafter], 14.[Echo] [Mr. Rafter/Echo] operated N911ME from Ellsworth, Maine, in IFR conditions with insufficient fuel to a) complete the flight to Portland, Maine; b) fly from Portland, Maine, to an alternate airport; and c) fly after that for 30 minutes at normal cruising speed.

As to respondent Rafter--

11. At the time of said flights on November 19, 1993, you had not, within the preceding six months, passed an instrument proficiency check under Section 135.297 administered by the Administrator or an authorized check pilot.

12. While enroute from Ellsworth, Maine, air traffic control cleared you to maintain an assigned altitude of 3000 feet. Said clearance was acknowledged by you.

13. You failed to maintain 3000 feet but descended to 2800 feet.

* * *

18. Prior to beginning your flights on November 19, 1993, you failed to familiarize yourself with all available information regarding your flights including weather information and fuel requirements.

As to respondent Echo, Inc.--

10. At the time of said flights on November 19, 1993, Echo, Inc. used Mr. Rafter as pilot in command when he had not, within the preceding six months, passed an instrument proficiency check under Section 135.297 administered by the Administrator or an authorized check pilot.

* * *

16. At all relevant times, Mr. John G. Rafter served as the President, Director of Operations, Director of Maintenance and pilot in command of Echo, Inc.

Based on these allegations, the Administrator charged respondents Rafter and Echo, Inc. with violations of FAR sections 91.9(a), 91.167, 91.13(a), 135.209(b), 135.5, 135.297(a), 135.101, and 135.181(a)(1); respondent Rafter alone with violations of sections 61.57(e), 91.103, and 91.123(a); and respondent Echo, Inc. alone with a violation of section 135.21(a).³ See FAR, 14

³FAR sections 61.57(e), 91.9(a), 91.13(a), 91.101, 91.103, 91.123(a), 91.167, 135.209(b), 135.5, 135.297(a), 135.101, and 135.181(a)(1) provide in relevant part as follows:

§ 61.57 Recent flight experience: Pilot in command.

(e)*Instrument--(1) Recent IFR experience.* No pilot may act as pilot in command under IFR, nor in weather conditions less than the minimums prescribed for VFR, unless he has, within the past 6 calendar months--

(i) In the case of an aircraft other than a glider, logged at least 6 hours of instrument time under actual or simulated IFR conditions, at least 3 of which were in flight in the category of aircraft involved, including at least six instrument approaches, or passed an instrument competency check in the category of aircraft involved...

(2)*Instrument competency check.* A pilot who does not meet the recent instrument experience requirements of paragraph

(..continued)

(e)(1) of this section during the prescribed time or 6 calendar months thereafter may not serve as pilot in command under IFR, nor in weather conditions less than the minimums prescribed for VFR, until he passes an instrument competency check in the category of aircraft involved, given by an FAA inspector...or an FAA-approved check pilot....

§ 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.101 Applicability.

This subpart prescribes flight rules governing the operation of aircraft within the United States and within 12 nautical miles from the coast of the United States.

§ 91.103 Preflight action.

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight....

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

§ 91.167 Fuel requirements for flight in IFR conditions.

(a) Except as provided in paragraph (b) of this section, no

CFR Parts 91, 135, and 61. The law judge upheld all of the

(..continued)

person may operate a civil aircraft in IFR conditions unless it carries enough fuel (considering weather reports and forecasts and weather conditions) to--

- (1) Complete the flight to the first airport of intended landing;
- (2) Fly from that airport to the alternate airport; and
- (3) Fly after that for 45 minutes at normal cruising speed or, for helicopters, fly after that for 30 minutes at normal cruising speed.

§ 135.5 Certificate and operations specifications required.

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part...

§ 135.101 Second in command required in IFR conditions.

Except as provided in §§ 135.103 and 135.105, no person may operate an aircraft carrying passengers in IFR conditions, unless there is a second in command in the aircraft.

§ 135.181 Performance requirements: Aircraft operated over-the-top or in IFR conditions.

(a) Except as provided in paragraphs (b) and (c) of this section, no person may--

- (1) Operate a single-engine aircraft carrying passengers over-the-top or in IFR conditions....

§ 135.209 VFR Fuel supply.

(b) No person may begin a flight operation in a helicopter under VFR unless, considering wind and forecast weather conditions, it has enough fuel to fly to the first point of intended landing and, assuming normal cruising fuel consumption, to fly after that for at least 20 minutes.

§ 135.297 Pilot in command: Instrument proficiency check requirements.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

charges save the one under section 135.209(b) that the respondents had commenced the flight with insufficient fuel aboard for the intended roundtrip and a 20 minute reserve. The Administrator did not appeal the dismissal of that charge.

On appeal, the respondents, by counsel, raise three main objections to the initial decision.⁴ First, they argue that the evidence does not support the law judge's conclusions that the flights at issue were operated when the weather conditions were below applicable minimums and that the charges related to the IFR operation on the return leg of the trip were not excusable because of the emergency created by the helicopter's asserted unintentional entry into instrument meteorological conditions. Next, the respondents contend that the law judge erred in refusing to admit evidence in support of a belated attempt to deny that the first leg of the trip had been operated under FAR Part 135, as had been admitted in their answer. Last, the respondents argue that the sanction of revocation is too severe and not supported by precedent. We discuss each of these objections in turn below.

We find merit in the challenge to the evidence on which the section 135.5 charge against the respondents is predicated. Stated differently, we are not persuaded that the Administrator adequately proved that respondent Rafter commenced the flight to

⁴Respondents' request for oral argument is denied, as they have identified no reason why the record and the written submissions of the parties on appeal should not be considered an adequate basis for decision on all issues before us.

Ellsworth when he did not have the weather minimums required by Echo's Operations Manual and Specifications, that is, at least an 800 foot ceiling and two miles' visibility. The weather briefing respondent Rafter obtained before takeoff from the Bangor Flight Service Station, in addition to reflecting somewhat better conditions along his intended route, advised, with respect to the ceiling at Portland, that the last special observation indicated a measured ceiling there of "six hundred feet variable overcast" with four miles' visibility.⁵ However, it also advised that Portland was reporting its ceiling "as variable between five hundred feet and eight hundred feet." Id. Short of some showing that respondent Rafter actually took off into an area where the ceiling was less than 800 feet, for example, into an area in which the ceiling at Portland had just been observed or measured to be below that, we do not believe that this weather information supports, much less compels, any conclusion that he took off in violation of company minimums.⁶

Respondent was not obligated, as the law judge appears to suggest, to forego the operation simply because the ceiling was no greater than the specified minimum or because conditions were marginal for VFR flight, and, given the considerably higher ceilings and visibilities for at least the near term at reporting

⁵A transcription of the briefing was admitted into evidence as Administrator's Exhibit A-2.

⁶While the Administrator made no such showing here, the respondent testified, without contradiction, that following takeoff he could see the top of a lighted radio tower he knew to be 720 ft. high.

points more or less between Portland and Ellsworth, we perceive no reason to question respondent Rafter's judgment that the flight to Ellsworth could safely and lawfully be made. In any event, we will, for want of sufficient evidence, reverse the affirmation of the section 135.5 charges, a circumstance which moots respondents' contention that, among other things, the law judge should have allowed them to introduce or submit additional evidence relevant to determining whether an air ambulance flight, before it has enplaned a patient, is operating under Part 91 or Part 135.

Notwithstanding our agreement with respondents that the flight to Ellsworth breached no cited regulation, we agree with the Administrator that the operation into instrument meteorological conditions (IMC) on the return trip, albeit creating an emergency situation, should not serve to excuse any violations that would otherwise be found to have been committed if no exigent circumstance had arisen. Our conclusion in this respect is not, however, based on precedent sustaining the view that emergencies of a pilot's own making will not immunize deviations from regulatory requirements. See, e.g., Administrator v. Sidicane, 3 NTSB 2447 (1980). To be sure, the weather forecast for Portland during the time within which respondent Rafter should have been able to complete his flight did contain the caution that "occasionally ceilings may go down to five hundred feet overcast and visibility down to one mile...." Adm. Exh. A-2. However, it also forecast, for a

period of time extending several hours after respondent would have returned, for "five hundred scattered *one thousand five hundred overcast* visibility three miles in light rain and fog winds out of the southeast at one four zero degrees at twelve." Id., emphasis added. While the weather, due to a front approaching from the west, appears to have deteriorated far more quickly than had been foreseen, we are not convinced that respondent Rafter should have understood the forecast to present an unacceptably high likelihood that the return trip could not be performed without entry into IMC. These circumstances persuade us that it is questionable whether respondents should be denied the deviation authority granted by the emergency provision simply because the aircraft entered IMC that respondent Rafter reasonably knew he might encounter on the trip back. We think, instead, that the emergency provision should be held not to apply because respondent Rafter did not minimize his departure from regulatory requirements once he, if he is to be believed, inadvertently lost his ability to operate the flight under VFR about midway through the return trip.

FAR section 91.3(b) states that "[i]n an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part *to the extent required to meet that emergency*" (Emphasis added). The Administrator does not appear to quarrel with respondent Rafter's decision to climb, contact ATC, and go on instruments when he found himself in IMC. He maintains, however, and we agree, that respondent Rafter should

have enlisted ATC's assistance for a landing as soon as possible, rather than continue a flight he knew could not be operated lawfully, since he lacked instrument currency, his aircraft was not certified for instrument flight, and his company was not permitted to provide air ambulance service under IFR. Instead, respondent Rafter obtained an IFR clearance, accepted an altitude for which he had not earlier acquired wind information,⁷ and, without either declaring an emergency or advising ATC that neither he nor his aircraft should be operating on IFR, proceeded to fly toward Portland for at least another 30 minutes before recognizing the onset of yet another emergency; namely, a low fuel condition brought on by a strong quartering headwind that drastically slowed his progress. Respondents do not argue that the aircraft could not have promptly landed with help from ATC, and we perceive no justification in the record for the failure to keep to an absolute minimum the flight's duration in weather conditions respondents were obligated for numerous reasons to avoid. In these circumstances, it is clear that respondent Rafter's deviations from various regulations pertaining to IFR flight went far beyond what was necessary to meet the emergency his assertedly unintended entry into IMC created.

⁷We do not seriously fault respondent Rafter for not obtaining winds aloft information for a flight he expected to operate at or near his authorized ceiling minimum. At the same time, this case illustrates that he would have benefitted from acquiring such forecasts, as they presumably would have alerted him to the different fuel requirements a return flight at the higher altitudes would pose.

On the matter of sanction, it must be observed that the case originally brought by the Administrator alleged conduct considerably more serious than the law judge or we have found to have been established. In fact, given the rejection of the charges that the flight was begun with inadequate fuel and without necessary weather minimums, the conduct to be sanctioned primarily involves respondent Rafter's decision to continue the flight to his destination after it became evident that doing so could not be accomplished in VFR conditions.⁸ We have not found any Board cases, including those cited to us by counsel, to be closely on point, but have determined that respondent Rafter's decision, in his individual capacity as a pilot for Echo, to proceed with a flight he should have terminated, while evincing exceptionally poor judgment, does not support a conclusion that he lacks qualification to hold an airman certificate. A 180-day suspension is, in our view, an appropriate and adequate sanction for his failure on this flight to exercise the rights secured by his certificate with the necessary care, judgment, and responsibility.

We are persuaded, nevertheless, that revocation of Echo's air carrier certificate is warranted. Respondent Rafter is not only a pilot for Echo, he is also its President, Director of Operations, and Director of Maintenance. We think that a serious operational misjudgment that may be excusable as an aberrant

⁸The law judge, who believed respondent Rafter did not have minimums when he started the flight, found that he had acted carelessly, not recklessly.

occurrence for an individual pilot becomes indefensible when that pilot is, also, the person in control of a carrier's operations, for an air carrier whose management does not adhere unflinchingly to all relevant operational standards does not meet its obligation to provide the highest degree of safety. We think that when respondent Rafter, with full knowledge that neither he nor his aircraft should be operating under IFR surreptitiously, chose to disregard, contrary to numerous requirements, his company's operations specifications and manual by proceeding with a flight he should have ended, he demonstrated that respondent Echo lacks the compliance disposition expected and demanded of an air carrier. Revocation is therefore appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal of respondent Echo, Inc. is denied;
2. The appeal of respondent Rafter is granted in part;
3. The initial decision is reversed to the extent it affirmed revocation of respondent Rafter's airman certificate and found violations of FAR section 135.5, and it is affirmed to the extent it is otherwise consistent with this opinion and order;
and
4. The emergency order of the Administrator revoking respondent Rafter's commercial pilot certificate is modified to provide for a 180-day suspension of that certificate.

VOGT, Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.